

IN THE SUPREME COURT OF MISSOURI

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LEBANON SCHOOL DISTRICT R-III,	)	
	)	
Relator,	)	
	)	
v.	)	Appeal No.: SC86873
	)	
HON. LARRY WINFREY,	)	
Presiding Judge,	)	
Missouri Associate Circuit Court,	)	
Twenty-Sixth Judicial Circuit,	)	
Laclede County,	)	
	)	
Respondent.	)	

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ORIGINAL PROCEEDING IN PROHIBITION

ON PRELIMINARY RULE IN PROHIBITION FROM THE SUPREME COURT OF MISSOURI  
TO THE HONORABLE LARRY WINFREY, PRESIDING JUDGE OF THE ASSOCIATE CIRCUIT  
COURT OF LACLEDE COUNTY

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BRIEF OF RESPONDENT

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H. Lynn Henry        #23679  
HENRY, HENRY, ENGELBRECHT  
& WILLIAMS, P.C.  
1207 Porter Wagoner Boulevard  
P.O. Box 617  
West Plains, Missouri 65775  
(417) 256-8133  
(417) 256-8969 (Facsimile)  
*Attorneys for Respondent*  
*Honorable Larry Winfrey*

Eric Hutson        #37106  
HUTSON LAW FIRM, L.L.C.  
211 E. Commercial  
P.O. Box 1222  
Lebanon, Missouri 65536  
(417) 588-3267  
(417) 588-2216 (Facsimile)  
*Attorneys for Respondent*  
*Honorable Larry Winfrey*

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## **STATEMENT OF FACTS**

For a more complete Statement of Facts, Respondent states that on November 18, 2004, Amanda Slover, through her mother and next friend, Tina Wilmouth, filed her Petition against Lebanon School District R-III and Jeff Lackey seeking damages for personal injuries sustained by Amanda when a set of bleachers on which she was standing collapsed during a school choir concert. (A1) On January 21, 2005, an Answer of Defendant Lebanon School District R-III was filed. (A6) On February 11, 2005, Defendant Lackey's Motion to Dismiss was filed. (A10)

On February 23, 2005, a Motion for Leave to File First Amended Petition was filed. (A15) On March 7, 2005, Defendant Jeff Lackey's Motion to Dismiss First Amended Petition was filed and on March 8, 2005, an Answer of Defendant Lebanon School District R-III to Plaintiffs' First Amended Petition was filed. (A16) On March 9, Plaintiffs' Response to Defendant Jeff Lackey's Motion to Dismiss First Amended Petition was filed. (A16)

On March 16, 2005, Plaintiffs' Joint Application for Change of Venue and Change of Judge was filed. (A16) On May 11, 2005, Defendant Lackey's Motion to Dismiss was overruled and Defendant Lackey was given 20 days to file an Answer. (A17) On May 13, 2005, after having considered the arguments of the parties and their respective suggestions, Plaintiffs' Motion for Change of Venue was sustained. (A19)

## ARGUMENT

- I. Lebanon School District is not entitled to an order prohibiting Respondent from taking any action other than overruling Plaintiffs' Motion for Change of Venue because §508.050 R.S.Mo. only governs where suits against municipal corporations shall be commenced and Civil Rule 51.03, not §508.050 R.S.Mo., governs the right to a change of venue in a civil action triable by jury in a county having less than seventy-five thousand inhabitants.**

The issue before the Court is whether Civil Rule 51.03 or §508.050 R.S.Mo. governs a change of venue application in a civil action triable by jury in a county having less than seventy-five thousand inhabitants.

The applicable Civil Rule provides in relevant part,

**“51.03. Change of Venue from Inhabitants as Matter of Right in Counties of Seventy-five Thousand or Less Inhabitants-Procedure**

(a) A change of venue **shall** be ordered in a civil action triable by jury that is pending in a county having seventy-five thousand or less inhabitants upon the filing of a written application therefor not later than ten days after answer is due to be filed. . .

(c) If a timely application is filed, the court immediately **shall** order the case transferred to some other county convenient to the parties, first giving all parties the opportunity to make suggestions as to where the case should be sent.” (emphasis ours)

Civil Rule 51.03 was discussed in the case of *In Re Boeving's Estate*, 368 S.W.2d 40 (Mo. App. S.D. 1965),

“(I)n determining whether an application for change of venue or disqualification of judge properly may be entertained in any given proceeding in circuit court, the inquiry is whether that proceeding is a “civil suit” within the contemplation and meaning of Rule 51.03” *Id.* at 41.

The Court also noted that the rule should be construed liberally in favor of the right to grant such change of venue. *Id.* at 50.

This Court has recognized that a suit against a municipal corporation is a proceeding in which a change of venue is permissible in the case of *Bizzell v. Kodner Development Corp.*, 700 S.W.2d 819, 822 (Mo. banc 1985). In the *Bizzell* case, plaintiffs originally filed their petition in St. Charles County naming several defendants, but not the City of St. Peters, which was a municipal corporation situated in St. Charles County. Venue was changed to Lincoln County on motion of one of the named defendants. After trial in Lincoln County and the granting of a new trial, plaintiffs filed an amended petition joining the City of St. Peters in the Lincoln County suit. The City of St. Peters filed a motion to dismiss for improper venue and lack of jurisdiction. The motion was sustained by the trial court.

Plaintiffs’ argument on appeal was that, “the Lincoln County Circuit Court erred in sustaining the City of St. Peters’ motion to dismiss for improper venue and lack of subject matter jurisdiction.” *Id.* at 821. As stated by the Court,



“The City of St. Peters could have been joined as a defendant in the original action against St. Charles County because the property in question and the City of St. Peters are located in that county. See §§508.030 and 508.050, RSMo 1978. **There is no question but that the proceeding was one in which a change of venue was permissible.**” Id. at 821-822. (emphasis ours)

Likewise, there is no question but that Amanda Slover’s suit seeking damages for personal injuries against the Lebanon School District was a proceeding in which a change of venue was permissible.

Had the legislature intended that there be no change of venue in a suit against a municipal corporation, they could have so provided as they have done in other statutes. For example, in cases involving condemnation of property §88.067 R.S.Mo. provides that no change of venue shall be allowed in any of the proceedings under §88.010 to 88.070. The legislature provided a restriction against any change of venue in suits involving drainage districts by §242.650 R.S.Mo. Likewise, §245.255 R.S.Mo. which pertains to levy districts sets forth that there shall be no change of venue allowed in any of the proceedings had under the provisions of §245.010 to 245.280.

Relator argues that based on *State ex rel. Burlington Northern R. Co. v. Forder*, 787 S.W.2d 725 (Mo. banc 1990) the case must remain in Laclede County. *Burlington Northern* is clearly distinguishable in that it involved a third party petition which the court found could not be commenced in the City of St. Louis

where the municipal corporation was situated in Marion County. Discussing *Bizzell*, supra, the court stated, “*Bizzell* involved a change of venue. The transferee court became empowered by the change of venue to proceed as if the cause had been originally filed there.” Id. at 727 Although Relator argues that local officials should not have to defend suits across the state, in the concurring opinion in *Burlington Northern* Judge Holstein states, “Section 508.050, RSMo 1986, does not absolutely forbid municipalities from ‘defending suits in courts across the state.’” Id. at 728 Furthermore, it must be noted that under Civil Rule 51.03(c) the trial court on a timely application for change of venue cannot transfer a case across the state but must transfer the case, “to some other county convenient to the parties.” That is precisely what the Respondent below has done by sending the case to another county in the same circuit.

Relator takes the position that §508.050, which only sets forth where a cause of action against a municipal corporation shall be commenced, governs and supercedes Civil Rule 51.03. In fact, just the opposite is true. Civil Rule 41.01(a)(2) provides that Rules 41 through 101 shall govern civil actions pending before a Circuit Judge. Civil Rule 41.02 goes on to provide,

“Rules 41 to 101, inclusive, are promulgated pursuant to authority granted this Court by Section 5 of Article V of the Constitution of Missouri and supersede all statutes and existing court rules inconsistent therewith.”

A distinction must be made between a venue statute designating where suit must be commenced in the first instance, and the right to a change of venue during the pendency of litigation. §508.050 R.S.Mo. and Civil Rule 51.03 deal with separate matters. To the extent, however, that the two conflict, Civil Rule 51.03 and not §508.050, clearly supersedes and governs the issue of a right to change of venue in a pending civil action. When there is a conflict between the civil rules and statutes affecting procedural rights, the rule prevails. *Reichert v. Lynch*, 651 S.W.2d 141, 143 (Mo. banc 1983). See also *Ridgeway v. Asibem, Inc.*, 810 S.W.2d 352, 354 (Mo. App. W.D. 1991).

Article V, Section 5 of the Constitution of the State of Missouri provides, “The supreme court may establish rules relating to practice, procedure and pleading for all courts and administrative tribunals, which shall have the force and effect of law. The rules shall not change substantive rights, or the law relating to evidence, the oral examination of witnesses, juries, the right of trial by jury, or the right of appeal. The court shall publish the rules and fix the day on which they take effect, but no rule shall take effect before six months after its publication. Any rule may be annulled or amended in whole or in part by a law limited to the purpose.”

After quoting the constitutional provision the case of *State ex rel. Kinsky v. Pratte*, 994 S.W.2d 74, 75 (Mo. App. E.D. 1999) states,

“Pursuant to this authority the supreme court promulgated and continues to adopt rules of criminal and civil procedure which supersede all statutes and

court rules inconsistent herewith. Rules 19.02; 41.02. These rules take precedence over any contradictory statutes in procedural matters, unless the legislature specifically annuls or amends the rules in a bill limited to that purpose. *State v. Reese*, 920 S.W.2d 94, 95 (Mo. banc 1996); *Ostermueller v. Potter*, 868 S.W.2d 110, 111 (Mo. banc 1993).” Id. at 75

The case of *State ex rel. Helms v. Moore*, 694 S.W.2d 502 (Mo. App. S.D. 1985) addressed the issue of whether a joint application for change of judge and venue in a criminal case was controlled by Rule 32.08(c)(3) or by §478.255.3 R.S.Mo. Discussing the rule the Court stated,

“Rule 32.08(c)(3) is a rule relating to practice and procedure established pursuant to Mo. Const. Art. V, §5. The applications in question are within

the scope of that rule. With unmistakable clarity it provides the presiding judge should have transferred the cases to the other circuit judge or requested the Supreme Court to transfer a judge.” Id. at 504.

Next discussing §478.255.3, the Court noted that, “(I)t is in direct conflict with Rule 32.08(c)(3).” Id. at 504. The Court went on to hold that, “Rule 32.08(c)(3) controls. . .” Id. at 504.

With unmistakable clarity Rule 51.03 provides that the Respondent should have transferred the case pursuant to plaintiffs’ timely application for change of venue.

**II. Lebanon School District is not entitled to an order prohibiting Respondent from taking any action other than overruling Plaintiffs' Motion for Change of Venue because the motion was not barred under Rule 51.03 in that it was filed before Defendant Lackey's Motion to Dismiss was ruled and before Defendant Lackey's Answer was due to be filed.**

The applicable rule is as follows:

**“51.03. Change of Venue from Inhabitants as Matter of Right in Counties of Seventy-five Thousand or Less Inhabitants-Procedure**

(a) A change of venue **shall** be ordered in a civil action triable by jury that is pending in a county having seventy-five thousand or less inhabitants upon the filing of a written application therefor not later than ten days after answer is due to be filed. . .” (emphasis ours)

Relator erroneously argues that, “Plaintiffs had ten days after Lebanon School District's or Co-Defendant Lackey's Answer was due to be filed” in which to file their application for change of venue and because Relator had filed its Answer, yet Co-Defendant had not, that Plaintiffs' Motion was untimely. (Relator's Brief page 22) Relator erroneously argues that the time begins to run from the date the first answer is filed when there are multiple defendants. (Relator's Brief pages 21-22)

Although Respondent's research has not revealed a case addressing the issue of the triggering of the time period under Civil Rule 51.03 when there are multiple defendants, the case of *Rohde v. TRW Real Estate Services*, 836 S.W.2d 465 (Mo.

App. E.D. 1991) addresses the issue under Civil Rule 51.05(c) pertaining to a request for change of judge. In the *Rohde* case, the Court interpreted the rule that when there were multiple defendants the time period in which to file an application for change of judge did not begin to run until all of the parties had filed their answer and were before the Court.

As the docket sheet will reflect, Plaintiffs filed their Joint Application for Change of Venue and Change of Judge on March 16, 2005. Defendant Lackey had not yet filed an Answer and his Answer was not yet due to be filed. Since

Defendant Lackey had filed a Motion to Dismiss Civil Rule 55.2(c) altered the time when Defendant Lackey's answer was due until ten days after a denial of his motion. The Motion to Dismiss was overruled on May 11, 2005, and Defendant Lackey was given twenty (20) days to file an Answer.

The case of *State ex rel. Ott v. Bonacker*, 791 S.W.2d 494 (Mo. App. S.D. 1990) held that where a motion for change of judge was filed before a motion to dismiss was ruled the request for change was timely filed. Likewise, since Plaintiffs' request for change of venue was filed with the Trial Court nearly two months before Defendant Lackey's Motion to Dismiss was ruled, the request was timely under Civil Rule 51.03. See also *J.H. Cosgrove Contractors v. Kaster*, 851 S.W.2d 794 (Mo. App. W.D. 1993) wherein the court noted that the filing of any motion provided for in Rule 55.27, such as a motion to dismiss, can extend the deadline for the filing of an answer. *Id.* at 799. In *Cosgrove*, the defendants filed a

motion to dismiss along with a motion for more definite statement. The Trial Court granted the motion for more definite statement and plaintiffs filed an amended petition on October 15, 1991. Although defendant's answer to the amended petition would have been due ten days from that date, the Trial Court granted defendant's extension of time to respond to November 14, 1991. The application for change of judge was filed on November 5, 1991, which was before the answer was due to be filed and was held to be timely. In the case before the

Court the Plaintiffs filed their Motion for Change of Venue nearly two months before Defendant Lackey's Motion to Dismiss was overruled and Defendant Lackey given twenty days to file an answer. Plaintiffs had until May 31, 2005, and their motion filed on March 16, 2005, was clearly timely.

Relator cites *State ex rel. East Carter County R-II School District v. Heller*, 977 S.W.2d 958 (Mo. App. S.D. 1998). In that case, plaintiff conceded that he had not filed the request for change of venue within ten days after relator's answer was due to be filed. The case is clearly distinguishable from the case before the Court.

Finally, Relator argues that with regard to a motion for change of judge, unlike a motion for change of venue, the courts have adopted a liberal construction of the right to disqualify a judge. Relator argues that the change of judge rule should be granted more generously than the venue rule. In fact, no such distinction exists under Missouri law. In the case of *In Re Boeving's Estate*, 388 S.W.2d 40 (Mo. App. S.D. 1965) the court discusses the right to both in the same sentence stating,

“And, while the right to a change of venue **or** to disqualify the judge does not exist except as granted by the rule, we are of the opinion that, as was true under the antecedent statute, **the rule should be construed liberally in favor of the right to grant such change of venue or disqualification,** insofar as the applicability of the rule to particular classes of civil proceedings is concerned.” Id. at 50. (emphasis ours)

Moreover, the very first case cited in the footnote in *Boeving’s Estate* is *State ex rel. Sharp v. Knight*, 26 S.W.2d 1011 (Mo. App. W.D. 1930) which involved a change of venue holding that the change of venue statute is to be liberally construed in favor of the right to grant it.

The motion for change of venue was clearly timely under Rule 51.03 and Respondent correctly applied the law in sustaining the motion.

HENRY, HENRY, ENGELBRECHT  
& WILLIAMS, P.C.

By: \_\_\_\_\_  
H. Lynn Henry      #23679  
1207 Porter Wagoner Blvd.  
P.O. Box 617  
West Plains, MO 65775  
417-256-8133      Phone  
417-256-8969      Fax

HUTSON LAW FIRM, L.L.C.

By: \_\_\_\_\_  
Eric Hutson      #37106  
211 E. Commercial  
P.O. Box 1222



Lebanon, MO 65536  
(417) 588-3267 Phone  
(417) 588-2216 Fax

*ATTORNEYS FOR RESPONDENT  
HONORABLE LARRY WINFREY*

### **AFFIDAVIT OF SERVICE**

The undersigned certifies that a copy of Respondent's Brief and a disk containing same were deposited on this \_\_\_\_\_ day of September, 2005, in the United States Mail, postage prepaid, addressed to:

Joshua Margolis  
Brown & James, P.C.  
1010 Market Street, 20<sup>th</sup> Floor  
St. Louis, MO 63101  
(314) 421-3400  
(314) 421-3128 fax  
*Attorneys for Defendant  
Lebanon School District R-III*

Paul Rauschenbach  
Hahn, Enright & Crank  
701 Market Street, Suite 450  
St. Louis, MO 63101-1862  
(314) 436-2775  
(314) 436-0546 fax  
*Attorneys for Defendant  
Jeff Lackey*

Honorable Larry W. Winfrey  
Circuit Court of Laclede County  
200 N. Adams St.  
Lebanon, MO 65536  
(417) 532-2471  
(417) 532-3683 fax

\_\_\_\_\_  
H. Lynn Henry #23679

Subscribed and sworn to before me this \_\_\_\_\_ day of September, 2005.

\_\_\_\_\_  
Notary Public

My Commission Expires:

### **CERTIFICATE OF COMPLIANCE**

The undersigned certifies that Respondent's Brief contains approximately 3121 words, and that the computer disk filed with Respondent's Brief under Rule 84.06 has been scanned for viruses and is virus-free.

\_\_\_\_\_  
H. Lynn Henry      #23679